



39           “Contract” means any contract or purchase order through which the City procures goods  
40 or services, including construction manager at risk contracts as defined by N.C. Gen. Stat. § 143-  
41 128.1.

42           “Contractor” means a person that has a Contract with the City to provide goods or  
43 services.

44           “Director” means the Director of the Equal Opportunity/Equity Assurance Department or  
45 his/her designee.

46           “Commercially Useful Function” means responsibility for the execution of a distinct  
47 element of the work and the risk of the Contract which is carried out by actually performing,  
48 managing, and supervising the work involved.

49           “Economically Disadvantaged” means an individual whose Personal Net Worth is less  
50 than \$750,000.

51           “EO/EA Department” means the City’s Equal Opportunity/Equity Assurance  
52 Department.

53           “Expertise” means demonstrated skills, knowledge or ability to perform in the field of  
54 endeavor in which certification is sought by the firm as defined by normal industry practices,  
55 including licensure where required.

56           “Good Faith Efforts” are actions that the City finds are sufficient to meet the standards in  
57 Section 26-9.

58           “Goods” means apparatus, materials, supplies and equipment.

59           “Joint Venture” means an association of two or more persons, or any combination of  
60 types of business enterprises and persons numbering two or more, proposing to perform a single  
61 for profit business enterprise, in which each joint venturer contributes property, capital, efforts,  
62 skill and knowledge, and in which the SDBE is responsible for a distinct, clearly defined portion  
63 of the work of the Contract with the City and whose share in the capital contribution, control,  
64 management, risks, and profits of the joint venture are commensurate with its ownership interest.  
65 Joint ventures must have an agreement in writing specifying the terms and conditions of the  
66 relationships between the joint venturers and their relationship and responsibility regarding to the  
67 Contract with the City.

68           “Participation Plan” means the list of SDBEs that the Bidder commits will be utilized,  
69 their scopes of work, and dollar value or the percentage of the project or the scopes of work of the  
70 Contract they will perform.

71           “Personal Net Worth” means the net value of the assets of an individual after total  
72 liabilities are deducted. An individual's Personal Net Worth does not include the individual's  
73 ownership interest in the applicant and the individual's equity in his or her primary place of  
74 residence. An individual's Personal Net Worth includes his or her share of assets held jointly with  
75 the individual's spouse. Property held by the entireties is deemed to be owned equally by the  
76 spouses.

77           “Program” means the Equal Business Opportunity (EBO) Program.

"Project Specific Goals" means the Goals established for a particular project or Contract based upon the availability of SDBEs in the scopes of work of the Project, delineated into percentages of SDBEs owned by Blacks and women.

"SED" means Socially Disadvantaged and Economically Disadvantaged.

"Small Business Enterprise" (SBE) means a small business concern meeting the size standards described in the U.S. Small Business Administration regulations at 13 CFR Part 121.201, averaged over a three year period. The City will follow SBA regulations and guidance in applying these standards.

"Small Disadvantaged Business Enterprise" (SDBE) means a business, including a sole proprietorship, partnership, corporation, limited liability company, Joint Venture or any other business or professional entity.

(a) Which is at least 51% owned by one or more Socially and Economically Disadvantaged individuals, or in the case of a publicly owned business, at least 51% of all classes of the stock of which is owned by one or more Socially and Economically Disadvantaged individuals;

(b) Whose management, policies, major decisions and daily business operations are independently managed and controlled by one or more Socially and Economically Disadvantaged individuals;

(c) Which is Small Business Enterprise;

(d) Which has a physical location from which to engage in for profit activities in the scope(s) of expertise of the in the City's Marketplace; and

(e) Which is certified as a SDBE by the City.

"Socially Disadvantaged" means an individual who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of a group and without regard to individual qualities. Social disadvantage must stem from circumstances beyond the individual's control. A Socially Disadvantaged individual must be a citizen (or lawfully admitted permanent resident) of the United States who is either:

(a) Black/African-American, which includes persons having origins in any of the Black racial groups of Africa;

(b) Female; or

(c) Any individual found by the City on a case-by-case basis to have been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of a group, without regard to individual qualities. Social Disadvantage must stem from circumstances beyond the individual's control. Evidence of Social Disadvantage must include:

(1) At least one objective, distinguishing feature that has contributed to Social Disadvantage, such as disability, long-term residence in an environment isolated from the mainstream of American society or other similar barriers not common to individuals who are not Socially Disadvantaged;

(2) Personal experiences of substantial and chronic Social Disadvantage in American society, not in other countries, and

(3) Negative impact on entry into or advancement in the City's Contracting Marketplace and participating on City Contracts because of the disadvantage, as demonstrated by the individual's education, employment and business history.

"Subcontractor" means a person that directly or indirectly contracts with a Contractor, to provide goods and/or services in connection with a Contract, including persons that contract with subcontractors of any tier.

"User Department" means the department of the City that the City Manager designates as responsible for initiating the procurement process.

Section 26-4. Administration.

(a) The City Manager shall implement this Chapter.

(b) The City Manager's duties shall include:

(1) Adopting rules for the implementation and monitoring of the Program.

(2) Informing SDBEs of City contracting opportunities.

(3) Providing information and assistance to SDBEs relating to City procurement practices and procedures, and Bid specifications, requirements, and prerequisites.

(4) Certifying businesses as SDBEs, maintaining certification records, and maintaining a SDBE availability data bank.

(5) Establishing Project Specific Goals.

(6) Evaluating Bidders' and Contractors' achievement of Project Specific Goals or Good Faith Efforts to meet Project Specific Goals.

(7) Working with User Departments to monitor Contracts to facilitate prompt payments to SDBEs and compliance with Project Specific Goals and commitments.

(8) Receiving, reviewing, and acting upon complaints and suggestions concerning the Program.

(9) Collecting data to evaluate the Program and other City contracting initiatives.

(10) Monitoring and reporting on the Program and the City's progress towards the Annual Participation Goals.

(c) The User Departments which receive appropriate delegation for project management, contract management, and/or construction and/or design contract responsibility shall have the following duties and responsibilities with regard to the Program:

(1) Assisting the EO/EA Department with setting Project Specific Goals.

(2) Assisting in the identification of available SDBEs, and providing other assistance in meeting the Annual Participation and Project Specific Goals.

(3) Performing other activities to support the EBO Program.

(4) Gathering and maintaining subcontracting data for those Contracts which they manage.

(5) Submitting subcontracting data to the Director within 14 days of progress payments and 30 thirty days of Contract closeout.

(6) Managing Contracts in a consistent manner to facilitate contract compliance in utilization of SDBEs.

(7) Submitting to the Director, on or before the beginning of each fiscal year, the Department's annual SDBE contracting goal based upon a project identification survey listing all upcoming projects, estimating the probable monetary value, the projected Bid advertisement date and the necessary qualifications.

#### Section 26-5. Race- and Gender-Neutral Measures to Ensure Equal Opportunities for All Contractors and Subcontractors and to Promote Business Development.

The City Manager shall develop and use race- and gender-neutral measures to facilitate the participation of SDBEs in City contracting activities. These measures shall include, but are not limited to:

(a) Arranging solicitation times for the presentations of Bids, quantities, specifications, and delivery schedules so as to facilitate the participation of interested persons.

(b) Providing timely information on contracting procedures, Bid preparation, and specific contracting opportunities.

(c) Holding pre-Bid conferences, where appropriate, to explain the projects and to encourage potential Bidders to solicit available SDBEs as Subcontractors or as Joint Venturers.

(d) Adopting prompt payment procedures, including requiring by contract that Contractors pay their direct Subcontractors within a stated period of receipt of payment from the City, subject to appropriate exceptions.

(e) Reviewing bonding and insurance requirements to eliminate unnecessary barriers to contracting with the City.

(f) Maintaining a Bidders list, consisting of all persons Bidding on City prime Contracts and Bidding or quoting on City funded subcontracts.

(g) Providing technical assistance, which may include:

(1) A surety bonding assistance and support program to provide access to surety bonding and contract financing.

(2) A mentor-protégé program.

#### Section 26-6. EBO Program Eligibility.

(a) Only businesses that meet the criteria of SDBEs may be certified for participation in the Program. The applicant for certification as a SDBE has the burden of persuasion based upon the preponderance of the evidence.

(b) Only a firm owned by a SED person(s) may be certified as a SDBE.

(1) The firm's ownership by a SED person must be real, substantial, and continuing, going beyond *pro forma* ownership of the firm as reflected in ownership documents.

The SED owner(s) must enjoy the customary incidents of ownership and share in the risks and profits commensurate with that ownership interest.

(2) The contributions of capital or Expertise by the SED owner(s) to acquire the ownership interest must be real and substantial. If Expertise is relied upon as part of a SED owner's contribution to acquire ownership, the Expertise must be of outstanding quality in a specialized field, in areas critical to the firm's operations, indispensable to the firm's potential success, and specific to the type of work the firm performs. The individual whose Expertise is relied upon must have a significant financial investment in the firm.

(c) Only a firm that is managed and controlled by SED owners may be certified as a SDBE.

(1) A firm must not be subject to any formal or informal restrictions that limit the discretion of the SED owner(s). There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices that prevent the SED owner(s), without the cooperation or vote of any non-SED person, from making any business decision of the firm.

(2) The SED owner(s) must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on management, policy and operations.

(3) The SED owner(s) may delegate various areas of the management, policymaking or daily operations of the firm to persons who are not SED. Such delegations of authority must be revocable, and the SED owners must retain the power to hire and fire any such person. The SED owners must exercise control over the firm's operations, work, management and policies.

(4) The SED owner(s) must have an overall understanding of, and managerial and technical competence, experience and expertise, directly related to the firm's operations and work. The SED owner(s) must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to make independent decisions concerning the firm's daily operations, work, management, and policymaking

(5) If any Law requires the owners to have a particular license or other credential to operate, own and/or control a certain type of business, then the SED owner(s) must possess the required license or credential. If the Law does not so require, that the owner(s) lacks such license or credential is a factor in determining whether the SED owner(s) actually controls the firm.

(6) A SED owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the owner from devoting sufficient time and attention to the affairs of the firm to manage and control its activities.

(d) Only an independent firm may be certified as a SDBE. An independent firm is one whose viability does not depend on its relationship with another firm. Recognition of an applicant as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is independent. In determining whether an applicant is an independent business, the City Manager will:

(1) Scrutinize relationships with non-SDBEs in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) Consider whether present or recent employer/employee relationships between the SED owner(s) of the applicant and non-SDBEs or persons associated with non-SDBEs compromise the applicant's independence.

(3) Examine the applicant's relationships with non-SDBE prime Contractors to determine whether a pattern of exclusive or primary dealings with a prime Contractor compromises the applicant's independence.

(4) Consider the consistency of relationships between the applicant and non-SDBEs with normal industry practice.

(e) In order to be certified as an SDBE, a firm must be a Small Business Enterprise and must have a physical location, in the City's Contracting Marketplace, from which it engages in for-profit activities in the scope(s) of its Expertise.

(f) An applicant shall be certified only for specific types of work in which the SED owner(s) has the ability and Expertise to manage and control the firm's operations and work.

(g) The City shall certify the eligibility of Joint Ventures in which the Joint Venturers are SDBEs and non-SDBEs.

(h) In lieu of conducting its own investigation to determine whether an applicant is eligible for certification, the City may consider a formal certification by another entity to determine whether the applicant meets the requirements of the Program, provided that the City Manager determines that the certification standards of such entity are comparable to those of the City.

(i) Where federal or state Law or regulations or any agreement between the City and a federal or state agency requires different eligibility standards, the applicable federal or state standards shall apply, including, if applicable, the regulations promulgated by the United States Departments of Transportation and Housing for contracts involving federal funds. Where the City is to receive, apply, administer, or use funds from the federal government or the State government or any entity, agency, or grantee of either of them, if the City is required to apply a disadvantaged business program or program whose purposes are to help ensure opportunities for small firms owned by socially and economically disadvantaged persons, that other program, instead of this chapter, shall apply in the award and administration of the contract.

(j) The certification status of all SDBEs shall be reviewed biannually by the City Manager. Failure of a SDBE to seek recertification by filing the necessary documentation with the City Manager within 90 days from the date of receipt of written notice shall result in decertification.

(k) It is the responsibility of the SDBE to notify the City Manager of any change in its circumstances affecting its continued eligibility for the Program. Failure to do so within a reasonable time of the change may result in the firm's decertification.

(l) The City Manager shall decertify a firm that does not continuously meet the eligibility criteria.

(m) A firm whose average annual gross receipts exceed the size standards for SBEs for three consecutive years shall graduate from the Program.

(n) The City Manager may decertify a SDBE that repeatedly fails to respond to requests for quotations from Bidders who timely solicit participation on a Contract, attend relevant pre-Bid conferences, or honor Bids in good faith.

(o) A firm that has been denied certification or recertification or been decertified may protest the denial or decertification as follows:

(1) Within 7 days of receipt of denial of certification or recertification, or notice of intent to decertify, the firm may protest such action in writing to the City Manager.

(2) A hearing shall be held by the City Manager at which the firm may present additional facts and evidence in support of its eligibility. The City Manager shall control all aspects of the hearing, including scheduling, conduct, witnesses, and evidence, and may request

the attendance of witnesses and production of documents. The applicant's failure to comply promptly with these requests may be grounds for denial of relief sought by the applicant.

(3) The City Manager shall send notice of the written decision to the firm within 30 days of the hearing. The City Manager's decision shall be final.

(p) A firm found to be ineligible cannot apply for certification for one year after the effective date of the final decision.

#### Section 26-7. SDBE Goal setting.

The City Manager shall establish Project Specific Goals for SDBEs owned by Blacks and SDBEs owned by women, based on normal industry practice, the availability of at least two SDBEs to perform the scopes of work of the project and the City's utilization of SDBEs to date.

#### Section 26-8. Counting Participation of SDBEs.

(a) SDBEs that are owned by SED persons who are not Blacks or women may be counted by the Bidder towards either SDBE goal.

(b) The entire amount of that portion of a construction Contract that is performed by the SDBE's own forces shall be counted, as well as the cost of goods obtained or leased by the SDBE for the work of the Contract (except goods the SDBE Subcontractor or Joint Venture partner purchases or leases from the prime Contractor or its Affiliate).

(c) The entire amount of fees or commissions charged by a SDBE for providing a *bona fide* service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of a Contract, shall be counted, provided the fee is reasonable and not excessive as compared with fees customarily charged for similar services.

(d) When a SDBE performs as a participant in a Joint Venture, only the portion of the total dollar value of the Contract equal to the distinct, clearly defined portion of the work of the Joint Venture's Contract that the SDBE performs with its own forces and for which it is separately at risk shall be counted.

(e) Only expenditures to a SDBE that is performing a Commercially Useful Function shall be counted. To determine whether a firm is performing a Commercially Useful Function, the City will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the Contract is commensurate with the work it is actually performing and other relevant factors. To perform a Commercially Useful Function, the SDBE must be responsible, with respect to goods used on the Contract, for negotiating price, determining quality and quantity, ordering the goods, installing (where applicable) and paying for the goods itself. A SDBE does not perform a Commercially Useful Function if its role is limited to that of an extra participant in the Contract through which funds are passed in order to obtain the appearance of SDBE participation. If a SDBE subcontracts a greater portion of the work of a Contract than would be expected on the basis of normal industry practice, it is presumed not to perform a Commercially Useful Function. When a SDBE is presumed not to be performing a Commercially Useful Function, the SDBE may present evidence to rebut this presumption at a time and manner as determined by the City Manager.

(f) One hundred percent of the cost of the goods obtained from a SDBE Manufacturer or Regular Dealer shall be counted. "Manufacturer" means a firm that operates or maintains a factory or establishment that produces, on the premises, the goods required under the Contract. "Regular Dealer" means a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the goods of the general character described by the specifications or required under the Contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a Regular Dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the goods. Packagers, manufacture representatives, or other persons who arrange or expedite transactions are not Regular Dealers.

(g) One hundred percent of the fees for the delivery of goods required on a job site shall be counted only if the payment and amount of such fees are customary in the applicable industry. The cost of the goods shall not be counted towards the fees.

(h) If a SDBE is decertified during its performance of a Contract, the dollar value of work performed after it has ceased to be certified shall not be counted.

(i) In determining achievement of Project Specific Goals, the participation of a SDBE shall not be counted until that amount has been paid to the SDBE.

#### Section 26-9. Contract Pre-Award Compliance Procedures.

(a) The City Manager may prequalify all Bidders or proposers based upon their efforts to meet Program objectives prior to the solicitation of Bids for construction Contracts with an estimated Contract amount over \$200,000 and proposals for professional services Contracts with an estimated Contract amount over \$30,000.

(1) The City Manager shall evaluate the Bidder's or proposer's past, current and future activities and achievements in utilizing M/WBEs on City projects and private sector projects, and its recruitment, retention and promotion of minority and women employees and other relevant information.

(2) The City Manager may refuse to prequalify a Bidder or proposer.

(3) The City Manager's denial of prequalification may be appealed to the City Council in writing within 7 days of receipt. The City Council's decision shall be final.

(4) That a Bidder or proposer is denied prequalification on a Contract does not prohibit it from seeking to prequalify on future Contracts.

(5) A prequalified Bidder or proposer must make Good Faith Efforts to meet Project Specific Goals.

(b) In all solicitations for which Project Specific Goals have been established, the Bidder shall submit a Participation Plan when required by the City Manager detailing all Subcontractors from which the Bidder solicited Bids or quotations and its achievement of the Project Specific Goals or its Good Faith Efforts to do so. The Plan shall be submitted in accordance with the schedule and instructions required by the City Manager. If the Bidder fails to achieve the Project Specific Goals, documentation of its Good Faith Efforts to do so is due at the time specified in the solicitation. The list of SDBEs provided by the City to a Bidder establishes the universe from which a Bidder must solicit SDBEs.

375 (c) Any agreement between a Bidder and a SDBE in which the Bidder requires that the  
376 SDBE not provide subcontracting quotations to other Bidders is prohibited.

377 (d) SDBEs shall respond to relevant requests for quotations.

378 (e) Where the Bidder has not achieved the Project Specific Goal(s), the City Manager  
379 will determine whether the Bidder has made Good Faith Efforts to achieve those Goals. In  
380 making this determination, the City Manager will consider, at a minimum, the Bidder's efforts to:

381 (1) Solicit through all reasonable and available means (e.g., attendance at pre-Bid  
382 meetings, advertising and written or electronic notices) the interest of all SDBEs certified in the  
383 scopes of work of the Contract. The Bidder shall provide interested SDBEs with timely,  
384 adequate information about the plans, specifications, and requirements of the Contract to allow  
385 SDBEs to respond to the solicitation. The Bidder must follow up initial solicitations with  
386 interested SDBEs.

387 (2) Select portions of the work to be performed by SDBEs in order to increase  
388 the likelihood that the Project Specific Goals will be achieved. This includes, where appropriate,  
389 breaking out contract work items into economically feasible units to facilitate SDBE  
390 participation, even when the Bidder would otherwise prefer to perform these work items with its  
391 own forces. It is the Bidder's responsibility to make a portion of the work available to SDBEs and  
392 to select those portions of the work (including needs for goods) consistent with the availability of  
393 SDBEs so as to facilitate SDBE participation.

394 (3) Negotiate in good faith with interested SDBEs. Evidence of such negotiation  
395 includes the names, addresses, and telephone numbers of SDBEs that were contacted; a  
396 description of the information provided regarding the plans and specifications for the work  
397 selected for subcontracting; and specific information on why agreements could not be reached  
398 with SDBEs. The Bidder may not reject SDBEs as being unqualified without sound reasons based  
399 on a thorough investigation of their capabilities. That there may be some additional costs  
400 involved in finding SDBEs is not in itself sufficient reason for a Bidder's failure to meet the  
401 Project Specific Goals, as long as such costs are commercially reasonable. The ability or desire of  
402 a Bidder to perform the work of a contract with its own forces does not relieve it of the  
403 responsibility to make Good Faith Efforts.

404 (4) Make efforts to assist interested SDBEs in obtaining required bonding, lines  
405 of credit, or insurance as required by the City or Contractor, or providing alternatives to bonding  
406 or insurance for Subcontractors, if relevant to the work of the Contract.

407 (5) Make efforts to assist interested SDBEs in obtaining necessary goods or  
408 related assistance or services.

409 (6) Use the services of the City, available minority/women community  
410 organizations, minority and women contractors' groups, government sponsored minority/women  
411 business assistance agencies and other appropriate organizations to provide assistance in the  
412 recruitment of SDBEs.

413 (7) Attend any pre-Bid meetings scheduled by the City.

414 (f) In determining whether a Bidder has made Good Faith Efforts, the performance of  
415 other Bidders in meeting the Project Specific Goals may be considered.

416 (g) A signed letter of intent from all listed SDBEs describing the work, including goods  
417 and services to be performed or provided by the SDBE and the agreed upon dollar value for bids  
418 or percentage of professional services pursuant to a Request for Proposals or description of the  
419 services to be rendered pursuant to a Request for Qualifications shall be due in accordance with  
420 the City Manager's instructions.

(h) The City Manager shall review the Participation Plan prior to award, including the scope of work and the letters of intent from SDBEs. The City Manager may request clarification in writing of items listed in the Participation Plan, provided such clarification shall not include the opportunity to augment listed SDBE participation or Good Faith Efforts.

(i) If the City Manager determines that the Participation Plan demonstrates that the Project Specific Goals have been achieved or Good Faith Efforts were made, or that award is in the best interest of the City, then the City Manager shall recommend award to the City Council.

(j) If the City Manager finds that a Bidder did not make Good Faith Efforts, the City Manager shall send notice of the finding to the Bidder.

(1) The Bidder shall have 7 days from receipt of the notice to notify the City Manager of its request for a hearing.

(2) The City Manager shall hold a hearing within 14 days, and shall control all aspects of the hearing, including scheduling, conduct, witnesses, and evidence, and may request the attendance of witnesses and production of documents. The Bidder's failure to comply promptly with these directions and orders may be grounds for denial of the relief sought.

(3) The City Manager shall send notice to the Bidder of the written decision on the appeal within 14 days of the hearing. The City Manager's decision shall be final.

#### Section 26-10. Contract Performance Compliance Procedures.

(a) Contracts shall provide that the Participation Plan is binding on the Contractor. Project Specific Goals become elements of performance by the Contractor in favor of the City.

(b) The Contractor shall provide a listing of all Subcontractors to be used in the performance of the Contract, and Subcontractor payment information to the City with each request for payment submitted to the City. The Director and the User Department shall monitor Subcontractor participation during the course of the Contract and shall have reasonable access to all contract-related documentation held by the Contractor relevant to the Contract.

(c) After the City and the Contractor have executed the Contract, the Contractor shall not make changes to the Participation Plan or substitute SDBEs named in the Participation Plan without the prior written approval of the City Manager. Unauthorized changes or substitutions shall be a violation of this Chapter, and may constitute grounds for rejection of the Bid or proposal, termination of the Contract for breach, the withholding of payment and/or subject the Contractor to contract penalties or other sanctions.

(1) All requests for changes or substitutions of the Subcontractors named in the Participation Plan shall be made to the City Manager on a form provided or approved by the City, and shall clearly and fully set forth the basis for the request. A Contractor shall not substitute a subcontractor or perform the work designated for a Subcontractor with its own forces or with any other Subcontractor unless and until the City Manager approves such substitution in writing. A Contractor shall not allow a substituted Subcontractor to begin work until both the Director and the City's project manager have approved the substitution.

(2) The facts supporting the request must not have been known nor reasonably should have been known by either party prior to the submission of the Participation Plan. The Contractor must negotiate with the Subcontractor to resolve the problem. If requested by either party, the City shall facilitate such a meeting. Where there has been a mistake or disagreement about the scope of work, the SDBE can be substituted only where an agreement cannot be reached on commercially reasonable terms for the correct scope of work.

465 (3) The City Manager shall allow changes or substitutions of the Subcontractor  
466 only on the following bases:

- 467 (i) Unavailability after receipt of reasonable notice to proceed;
- 468 (ii) Failure of performance;
- 469 (iii) Financial incapacity;
- 470 (iv) Refusal by the Subcontractor to honor the Bid or proposal price or  
471 qualifications description;
- 472 (v) Mistake of fact or law about the elements of the scope of work of a  
473 solicitation where agreement on commercially reasonable terms cannot be reached;
- 474 (vi) Failure of the Subcontractor to meet insurance, licensing or bonding  
475 requirements; or
- 476 (vii) The Subcontractor's withdrawal of its Bid or proposal or  
477 qualifications description.

478 (4) The City Manager shall give written notice to the Contractor and the affected  
479 Subcontractor of the decision whether to permit or deny the proposed change or substitution.

480 (5) Where the Contractor has established the basis for the substitution to the  
481 satisfaction of the City Manager, or if the City requires the substitution of a Subcontractor listed  
482 in the Participation Plan, the Contractor shall make Good Faith Efforts to fulfill the Participation  
483 Plan. The Contractor may seek the assistance of the EO/EA Department in obtaining a new SDBE  
484 Subcontractor. If the Project Specific Goal(s) cannot be reached and Good Faith Efforts have  
485 been made, the Contractor may substitute with a non-SDBE.

486 (d) If a Contractor plans to hire a Subcontractor on any scope of work that was not  
487 previously disclosed in the Participation Plan, the Contractor shall obtain the approval of the City  
488 Manager to modify the Participation Plan and must make new Good Faith Efforts to ensure that  
489 SDBEs have a fair opportunity to Bid on the new scope of work.

490 (e) Changes to the scopes of work shall be documented by the User Department at the  
491 time they arise, to establish the reasons for the change and the effect on achievement of the SDBE  
492 goals.

493 (f) If the City Manager determines that the Contractor has failed to comply with the  
494 provisions of the Contract, the City Manager shall notify the Contractor in writing of the  
495 deficiencies. The Contractor shall have 14 days, or such time as specified in the Contract, to cure  
496 the deficiencies or establish that there are no deficiencies. If the deficiencies are not cured, the  
497 City shall have the right to take all lawful actions.

498 Section 26-11. Penalties.

499 (a) The following violations of this Chapter are unlawful and may be prosecuted as a  
500 misdemeanor.

501 (1) Providing false or misleading information to the City in connection with an  
502 application for or challenge to certification, recertification or decertification as a SDBE.

503 (2) Providing false or misleading information to the City in connection with  
504 submission of a Bid, responses to requests for qualifications or proposals, Good Faith Efforts  
505 documentation, post-award compliance or other Program operations.

506 (3) Substituting SDBE Subcontractors without prior approval.

507 (4) Committing any other violations of this Chapter.

508 (b) A Contractor is subject to withholding of payments under the contract, termination of  
509 the contract for breach, contract penalties, decertification as a SDBE, or or deemed non-  
510 responsive or not responsible in future City solicitations and contract awards, if it is found to  
511 have:

512 (1) Provided materially false or misleading information in connection with this  
513 Chapter, an application for certification or recertification

514 (2) Provided false or misleading information in connection with the submission  
515 of a Bid or proposal or documentation of Good Faith Efforts, post-award compliance, or other  
516 Program operations.

517 (3) Failed in bad faith to fulfill Project Specific Goals, thereby materially  
518 breaching the contract.

519 (4) Repeatedly failed to comply in good faith with substantive provisions of this  
520 chapter.

521 Section 26-12. EBO Program Advisory Committee.

522 (a) The City Council shall appoint a committee to advise it on the EBO Program.

523 (b) The Advisory Committee membership shall consist of SDBEs, non-SDBEs and other  
524 interested persons. The Director shall serve *Ex Officio*.

525 (c) Members shall serve two year, staggered terms.

526 (d) Membership shall be composed of the following:

527 (1) Two SDBE construction firm owners or representatives of disadvantaged,  
528 minority or women construction trade associations.

529 (2) One non-SDBE construction firm owner or representative of general or  
530 subcontracting construction trade associations.

531 (3) Two SDBE professional services firm owners or representatives of  
532 disadvantaged, minority or women professional services associations.

533 (4) One non-SDBE professional services firm owner or representative of  
534 professional services associations.

535 (5) One SDBE non-professional services or commodities firm owner or  
536 disadvantaged, minority or women trade association.

537

538 Section 26-13. Program Review and Sunset

539 (a) The City Manager shall make an annual report to the City Council, detailing the City's  
540 performance under the Program department by department for the preceding fiscal year.

541 (b) The City Council will review this report, including the Annual Participation Goals  
542 and the City's progress towards meeting the Annual Participation Goals and eliminating

discrimination in its marketplace, and revise the Program as necessary to meet legal and Program requirements.

(c) If the City Council finds that the objectives of the Program have been achieved, the City shall discontinue the Program.

(d) The Program shall sunset on March 31, 2006.

#### Section 26-14. Notice.

All notices required or allowed by this Chapter shall be in writing and shall be given either by personal delivery, fax, or United States mail, addressed to the last-known address of the addressee. The notice shall be deemed given at the time of actual delivery, if it is personally delivered or sent by fax. If sent by United States mail, it shall be deemed given upon the third calendar day following the day on which it is deposited with the United States Postal Service.

#### Section 26-15. Severability.

If any section, subsection, clause, or provision of this Chapter is held to be invalid by a court of competent jurisdiction, the remainder of the Chapter shall not be affected by such invalidity.

Section 2. This ordinance shall be effective at 12:01 AM on the 70<sup>th</sup> day after its adoption. This ordinance repeals and replaces all of the provisions of Chapter 26 of the City Code, except that the provisions of this Chapter, as it existed before said effective date, shall continue in effect with respect to all Contracts awarded before said effective date and to amendments to those Contracts made at any time.